

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION**

CARL MALONE

PLAINTIFF

v.

No. 3:22-cv-00035-NBB-JMV

COOKE INSURANCE CENTER, INC., ET AL.

DEFENDANTS

ORDER

This matter is before the court on Defendants' Second Motion to Compel [76], pursuant to F.R.C.P. Rule 37. The matter has since been fully briefed and a telephonic hearing held [82]. Accordingly, the court is prepared to rule. For the reason explained below, the motion will be denied.

By way of background, Plaintiff, an African American man, alleges that on or about August 10, 2021, Defendants discriminated against him on the basis of his race by denying him the right to enter a contract. Plaintiff responded to the Defendants' First Set of Interrogatories and Requests for Production of Documents on or November 13, 2022.

Interrogatory 8 reads: "Did you record or otherwise videotape the alleged incident? If so, please produce said recording or video pursuant to Request for Production No. 2. If you contend that you do not currently possess said video, please describe in detail what happened to said video and why you no longer possess it."

Plaintiff answered Interrogatory No. 8 as follows: "Plaintiff took a video recording of the incident on August 10, 2021. However, he has been unable to retrieve the video from his phone as at the date of filing these Responses, [sic] and will promptly send the same to Defendants['] attorney as soon as he retrieves the video."

By the instant motion, Defendants seek an order compelling Plaintiff to produce the subject video. In response [79], Plaintiff asserts, in relevant part, that he is “still unable to retrieve the video from his phone...Plaintiff cannot find and is not able to retrieve the video recording.”

A telephonic hearing on the instant motion was held on March 27, 2023. Upon questioning by the court, Plaintiff reiterated that he is not able to locate or retrieve from his phone the subject video. He represented further that though he undertook to record the events about which he complains in this lawsuit, he has never even seen the video; observed its presence in his phone; shown it to anyone; or sent it to anyone or anywhere. He has never sought professional help to retrieve any such video but did ask a friend to look at this phone, and said friend was also not able to locate or access the video on the phone.

In light of the foregoing representations to the court, the court will deny the motion to compel as it appears that at all relevant times, Plaintiff has not had, and does not have, the referenced video or access to it. Accordingly, compelling its production would be meaningless at this juncture.

SO ORDERED, this, the 29th day of March 2023.

/s/ Jane M. Virden

UNITED STATES MAGISTRATE JUDGE